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STATE OF WASHINGTON

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No. 45577-3-II

COURT OF APPEALS,  
DIVISION II,  
OF THE STATE OF WASHINGTON

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BELO MANAGEMENT SERVICES, INC., a Delaware  
Corporation; KIRO-TV, INC., a Delaware Corporation;  
TRIBUNE BROADCASTING SEATTLE, LLC, a  
Delaware Limited Liability Company; and, CBS  
CORPORATION,

Respondents,

v.

CLICK! NETWORK, a Department of the Tacoma Public  
Utilities Division of the CITY OF TACOMA; and  
TACOMA NEWS, INC.

TACOMA NEWS, INC. as,

Appellant.

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CBS CORPORATION'S RESPONSE TO *AMICUS CURIAE*  
BRIEF OF ALLIED DAILY NEWSPAPERS OF  
WASHINGTON AND WASHINGTON NEWSPAPER  
PUBLISHERS ASSOCIATION

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**ORIGINAL**

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**A. INTRODUCTION AND JOINDER**

COMES NOW, Respondent, CBS Corporation (“CBS”), and hereby responds to the *amicus curiae* brief of Allied Daily Newspapers of Washington and Washington Newspaper Publishers Association (“Amici”). CBS joins in the Response filed by Belo Management Services, Inc. (“Belo”), KIRO-TV, Inc. (“KIRO”), and Tribune Broadcasting Seattle, LLC (“Tribune Broadcasting”) (collectively, “Belo’s Response”), and adopts the argument and analysis set forth in Belo’s Response as though fully incorporated herein.

**B. ADDITIONAL FACTS SUPPORTING RETRANSMISSION FEES AS TRADE SECRETS.**

CBS adopts the analysis set forth in Belo’s Response and supplements, below, with citations to the record as relevant to CBS’s position in this litigation.

**1. Retransmission Fees are Maintained as Confidential.**

CBS’s retransmission fees are fastidiously maintained as confidential trade secrets. Joan Nicolais, CBS’s Senior Vice-President of Business Development, explained in her declaration the confidential

nature of the retransmission agreements. (CP 573-77; 639-44).<sup>1</sup> Notably, each of the broadcasters, including CBS, submitted either affidavits or declarations describing the public harm to the broadcasters that damages would result from the disclosure of the agreements. The City of Tacoma (“Tacoma”) also described the public harm in an affidavit from Click! Network’s (“Click”) manager. Yet, appellant, Tacoma News, Inc. d/b/a Tacoma News Tribune (“TNT”) did not submit any evidence opposing these affidavits or declarations. The unopposed evidence submitted clearly established public harm.

2. **Disclosure of CBS’s Trade Secrets Will Harm CBS and Click.**

As more fully detailed in CBS’s Response Brief, the unchallenged evidence shows that CBS and the public will be harmed by disclosure of the retransmission fees. Ms. Nicolais’s declarations establish that the disclosure of CBS’s trade secrets will substantially and irreparably harm CBS and the other broadcasters. (CP 575-76 at ¶¶6-9).<sup>2</sup> Ms. Nicolais details the problems that will ensue if CBS’s retransmission fees are publicly known; including that public disclosure of CBS’s pricing information would provide a competitive advantage to the cable operators

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<sup>1</sup> CBS more fully addresses the bases for the confidentiality of the retransmission fees in its Response Brief. (See CBS’s Response Brief at §§I(B)(1); (D)(2)(c)(1), (4)).

<sup>2</sup> See *id.* §§I(B)(2)-(3); (D)(4)(b)-(c).

and other multichannel video programming distributors (“MVPDs”) with which CBS negotiates such agreements. (*See e.g.* CP 575 at ¶5; CP 641 at ¶9; CP 642 at ¶10).

Given that the disclosure of the terms of such an agreement would be extraordinary, and indeed unprecedented in the industry, wide dissemination in the trade press may fairly be anticipated. (*Id.*). Since TNT is also seeking Click’s retransmission agreements with the independently-owned affiliates of the other major networks, such disclosure would likely affect scores of retransmission negotiations nationwide. (*Id.*). This again reflects the fact that these agreements are closely held; CBS’s pricing is not known to other broadcasters, and CBS does not know theirs. (*See id.*). Along with the above-described harm, Click also established that the disclosure of the retransmission fees was confidential. (*See* CP 169).

3. **The Court Did Not Need to Conduct an *In Camera* Review.**

Amici incorrectly assert that the Superior Court was required to conduct an *in camera* review prior to issuing an injunction. CBS joins in Belo’s argument and authority explaining that an *in camera* inspection is not required. In its Response brief, CBS fully details the appropriateness

and legal authority supporting the court declining to make an *in camera* review before issuing an injunction.<sup>3</sup>

Importantly, TNT never requested an *in camera* review of CBS's Agreement until *after* the Court issued the injunction and the parties had stipulated to a certification of appeal pursuant to Civil Rule 54(b). CBS offered to submit its entire, unredacted Agreement for *in camera* review by the Court in its preliminary injunction motion. (CP 633 at n.7). TNT did not respond to CBS's offer in either briefing or oral argument; in fact, TNT did not make any request at all for an *in camera* review until after the Court issued the injunction, certified the case for appellate review, and TNT unsuccessfully moved for reconsideration. (See CP 534-36). TNT accordingly waived this argument and should not be allowed to raise it for the first time after the fact, when it never requested an *in camera* review in its briefing or at oral argument, and when it had the court certify the case for appeal without making a request for an *in camera* review.<sup>4</sup>

The Superior Court's decision to rely on the uncontroverted affidavits submitted by CBS and the other broadcasters is reviewed for an

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<sup>3</sup> See CBS Resp. Br. at §D(6).

<sup>4</sup> See *Yakima County v. E. Wash. Growth Mgmt. Hearings Bd.*, 146 Wn.App. 679, 192 P.3d 12 (2008) ("if a party raises an issue but fails to provide argument relating to the issue in his or her brief, the party waives any challenge to the alleged issue."); *Felsman v. Kessler*, 2 Wn.App. 493, 498, 468 P.2d 691 (1970) (new evidence may only be submitted before a final judgment is entered).

abuse of discretion.<sup>5</sup> The Superior Court's decision cannot be an abuse of discretion where the broadcasters and Click filed a total of twelve uncontroverted declarations establishing the redacted material as trade secrets. These declarations stand in stark contrast to the dearth of any countervailing evidence produced by TNT. Given the lack of evidence contradicting the declarations establishing the redacted material as trade secrets, the court did not have to conduct an *in camera* review where such a review would serve no purpose. The Public Records Act ("PRA") specifically allows the court to decide whether to conduct an *in camera* review or rely on declarations.<sup>6</sup>

The declarations, without more, establish that the retransmission agreements are trade secrets; that the public will be harmed by their disclosure; and that CBS will suffer substantial and irreparable injury from such disclosure.<sup>7</sup> TNT did not submit any evidence contradicting or disproving these uncontroverted statements. To the extent TNT relies on its own news articles to contradict the broadcasters' overwhelming

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<sup>5</sup> See e.g., *Forbes v. City of Gold Bar*, 171 Wn.App. 857, 288 P.3d 384, 389 (2012); *Yakima Newspapers, Inc. v. City of Yakima*, 77 Wn.App. 319, 328, 890 P.2d 544 (1995).

<sup>6</sup> RCW 42.56.550(3) ("[t]he court *may* conduct a hearing based solely on affidavits.") (emphasis added); see also *Yakima Newspapers*, 77 Wn.App. at 328; *Spokane Research & Def. Fund v. City of Spokane*, 96 Wn.App. 568, 577, 983 P.2d 676 (1999)(upholding exemption of disclosure under PRA without an *in camera* review).

<sup>7</sup> See CBS's Response Br. §D(2); see also CP 34-38, 379-84; 325-61; 362-78; 142-156; 445-84; 573-77, 894-903; 887-893; 639-644



evidence, these self-serving materials must be ignored for their obvious bias and lack of probative value. The PRA allows the Superior Court to rely only on the declarations submitted without conducting an *in camera* review, which cannot be an abuse of discretion where there was no countervailing evidence submitted by TNT.



C. CONCLUSION

For the above-stated reasons, along with those detailed in Belo's Response, Amici's positions should be denied because CBS has established that its retransmission fees are exempt from public disclosure since they are confidential trade secrets under the Uniform Trade Secrets Act. The Superior Court correctly protected these trade secrets by issuing an injunction, and that injunction should be upheld on appeal.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of June, 2014.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

STATE OF WASHINGTON

I certify under penalty of perjury under the laws of the State of Washington that on June 16, 2014 I delivered a copy of the foregoing CBS Corporation's Response to *Amicus Curiae* Brief of Allied Daily Newspapers of Washington and Washington Newspaper Publishers Association pursuant to an e-mail agreement as follows:

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DATED this 17<sup>th</sup> day of June, 2014.

  
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